

1 JOHN F. DAUM (SBN 52313)
jdaum@omm.com
2 O'MELVENY & MYERS LLP
400 South Hope Street
3 Los Angeles, CA 90071-2899
Telephone: (213) 430-6111
4 Facsimile: (213) 430-6407

5 JONATHAN D. HACKER (*Pro hac vice*)
jhacker@omm.com
6 O'MELVENY & MYERS LLP
1625 Eye Street, NW
7 Washington, DC 20006-4001
Telephone: (202) 383-5300
8 Facsimile: (202) 383-5414

Attorneys for Defendant
9 EXXON MOBIL CORPORATION

10 [*Counsel Listing Continued on Next Page*]

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 NATIVE VILLAGE OF KIVALINA and CITY
OF KIVALINA,

15 Plaintiffs,

16 vs.

17 EXXON MOBIL CORPORATION; BP P.L.C.; BP
AMERICA INC.; BP PRODUCTS NORTH
18 AMERICA INC.; CHEVRON CORPORATION;
CHEVRON U.S.A., INC.; CONOCOPHILLIPS
19 COMPANY; ROYAL DUTCH SHELL PLC;
SHELL OIL COMPANY; PEABODY ENERGY
20 CORPORATION; THE AES CORPORATION;
AMERICAN ELECTRIC POWER COMPANY,
21 INC.; AMERICAN ELECTRIC POWER
SERVICES CORPORATION; DTE ENERGY
22 COMPANY; DUKE ENERGY CORPORATION;
DYNEGY HOLDINGS, INC.; EDISON
23 INTERNATIONAL; MIDAMERICAN ENERGY
HOLDINGS COMPANY; MIRANT
24 CORPORATION; NRG ENERGY; PINNACLE
WET CAPITAL CORPORATION; RELIANT
25 ENERGY, INC.; THE SOUTHERN COMPANY;
AND XCEL ENERGY, INC.,

26 Defendants.

CASE NO. C 08-01138 SBA

**ORDER RE: MOTION OF
CERTAIN OIL COMPANY
DEFENDANTS TO DISMISS
PLAINTIFFS' COMPLAINT
PURSUANT TO FED. R. CIV. P.
12(b)(6)**

1 RONALD L. OLSON (SBN 44597)
2 Ronald.Olson@mto.com
3 DANIEL P. COLLINS (SBN 139164)
4 Daniel.Collins@mto.com
5 MUNGER, TOLLES & OLSON LLP
6 355 South Grand Avenue, 35th Floor
7 Los Angeles, CA 90071-1560
8 Telephone: (213) 683-9100
9 Facsimile: (213) 687-3702

10 JEROME C. ROTH (SBN 159483)
11 Jerome.Roth@mto.com
12 MUNGER, TOLLES & OLSON LLP
13 560 Mission Street
14 San Francisco, CA 94105-2907
15 Telephone: (415) 512-4000
16 Facsimile: (415) 512-4077

17 Attorneys for Defendant
18 SHELL OIL COMPANY

19 STUART A. C. DRAKE (*Pro hac vice*)
20 sdrake@kirkland.com
21 ANDREW B. CLUBOK (*Pro hac vice*)
22 aclubok@kirkland.com
23 SUSAN E. ENGEL (*Pro hac vice*)
24 KIRKLAND & ELLIS LLP
25 655 Fifteenth Street, N.W.
26 Washington, D.C. 20005
27 Telephone: (202) 879-5173
28 Facsimile: (202) 879-5200

ELIZABETH DEELEY (SBN 230798)
edeeley@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1861
Facsimile: (415) 439-1500

Attorneys for CONOCOPHILLIPS COMPANY

ROBERT MEADOWS (*Pro hac vice*)
rmeadows@kslaw.com
TRACIE J. RENFROE (*Pro hac vice*)
trenfroe@kslaw.com
JONATHAN L. MARSH (*Pro hac vice*)
jlmarsh@kslaw.com
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002-5213
Telephone: (713) 751-3200
Facsimile: (713) 751-3290

LISA KOBIALKA (SBN 191404)
lkobialka@kslaw.com
KING & SPALDING LLP
1000 Bridge Parkway, Suite 100
Redwood City, CA 94065
Telephone: (650) 590-0700
Facsimile: (650) 590-1900

Attorneys for Defendants
CHEVRON CORPORATION and
CHEVRON U.S.A. INC.

MATTHEW HEARTNEY (SBN 123516)
Matthew.Heartney@aporter.com
ARNOLD & PORTER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4150
Facsimile: (213) 243-4199

PHILIP H. CURTIS (*Pro hac vice*)
Philip.Curtis@aporter.com
MICHAEL B. GERRARD (*Pro hac vice*)
Michael.Gerrard@aporter.com
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Facsimile: (212) 715-1399

Attorneys for BP AMERICA INC., AND
BP PRODUCTS NORTH AMERICA INC.

1 On June 30, 2008, Defendants ExxonMobil Corporation, Shell Oil Company,
2 Chevron Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, BP America Inc.,
3 and BP Products North America Inc. (the “Oil Company Defendants”) filed a “Motion of
4 Certain Oil Company Defendants To Dismiss Plaintiffs’ Complaint Pursuant to Federal
5 Rule of Civil Procedure 12(b)(6)” (“Motion”). Upon consideration of all of the moving,
6 opposition, and reply papers, the files and records of this case, and the argument presented
7 at the hearing on the Motion, the Court grants the Motion and orders the Complaint
8 dismissed with prejudice.

9 BACKGROUND

10 Plaintiffs are the Native Village of Kivalina and City of Kivalina, the self-described
11 “governing bodies” of a small Alaskan village. (Compl. ¶ 1.) They allege that a long-building
12 rise in atmospheric greenhouse gas concentrations is changing the planet’s climate: “human
13 activity” across the Earth “since the dawn of the industrial revolution” has increased greenhouse
14 gas levels which, in turn, have caused the earth to retain more heat; this global warming has led to
15 changing weather patterns and has delayed the annual formation of sea ice in the Arctic, leaving
16 the village of Kivalina susceptible to fierce winter storm activity; and storm activity has damaged
17 plaintiffs’ real property. (Compl. ¶¶ 4, 16-17, 124-127, 132.) Because carbon dioxide “persist[s]
18 in the atmosphere for several centuries,” “each year’s emissions” are “added to those that came
19 before,” creating planet-wide levels of atmospheric greenhouse gases that are warming the entire
20 Earth’s climate. (Compl. ¶ 125.) Collectively, human activity worldwide has caused atmospheric
21 carbon dioxide levels to “increase[] by 35 percent” since “the 18th century.” (*Id.*)

22 Plaintiffs do not explicitly allege that their claimed global warming-related property
23 damage was caused by the handful of companies they name in their suit. Nonetheless, plaintiffs
24 allege the Oil Company Defendants are liable in tort for plaintiffs’ damage because their
25 greenhouse gas emissions, like those from other human actors over the centuries, “contributed” to
26 global warming. (Compl. ¶ 67.) Plaintiffs raise four theories of recovery: first, a federal common
27 law public nuisance claim (Compl. ¶ 250); second, a state-law private and public nuisance claim
28 (Compl. ¶¶ 262-267); third and fourth, claims alleging that certain defendants conspired and acted

1 in concert to create, contribute to, or maintain a public nuisance (Compl. ¶¶ 268-282). As
 2 explained below, the Court determines that Plaintiffs have failed to state a claim upon which
 3 relief can be granted.

4 ANALYSIS

5 1. Plaintiffs do not allege facts in support of their nuisance claims that would
 6 establish that the defendants were the factual and legal cause of plaintiffs' property damage.
 7 Causation is an essential element of a nuisance claim, *see, e.g., Martinez v. Pacific Bell*, 225 Cal.
 8 App. 3d 1557, 1565-66 (1990), yet plaintiffs cannot show that the defendants' conduct is either a
 9 necessary or sufficient cause of their property damage. *See, e.g., Osborn v. Irwin Mem'l Blood*
 10 *Bank*, 5 Cal. App. 4th 234, 252 (1992); *Staton ex rel. Vincent v. Fairbanks Mem'l Hosp.*, 862
 11 P.2d 847, 851 & n.7 (Alaska 1993). According to plaintiffs' own complaint, the true cause of
 12 global warming is all greenhouse-gas emitting human activity worldwide since the dawn of the
 13 Industrial Revolution, not the defendants' emissions. (Compl. ¶ 132.) Defendants' conduct
 14 accordingly is not a substantial factor in causing their injury. *See* Restatement (Second) of Torts
 15 §§ 431-433; *Parks Hiway Enters. v. CEM Leasing, Inc.*, 995 P.2d 657, 666 (Alaska 2000);
 16 *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052-53 (1991). Neither are defendants' activities the
 17 legal cause of plaintiffs' injuries. On the facts as alleged by plaintiffs, defendants' emissions
 18 have "merged in the general forces that surround us," *Vincent*, 862 P.2d at 851 n.8, and their
 19 connection to plaintiffs' property damage is attenuated. Plaintiffs' nuisance claims must therefore
 20 be dismissed.

21 2. Plaintiffs cannot pursue a federal common law nuisance claim, both because any
 22 such claim is available only to States seeking injunctive relief and because Congress has by
 23 statute displaced the authority of federal courts to create common law rules in this area. "[I]t is
 24 for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of
 25 federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). Plaintiffs do not contend
 26 that Congress has affirmatively authorized the courts to regulate greenhouse gas emissions. *Cf.*
 27 *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988) ("Congress has not
 28 authorized the courts to develop a substantive law of air pollution."). Nor is there "a uniquely

1 federal interest' in protecting the quality of the nation's air." *Id.* at 1203. In the absence of a
 2 sovereign State as plaintiff asserting that pollution interferes with the use or enjoyment of its
 3 territory, courts have no authority to create a federal common law nuisance tort. *Id.* at 1205.
 4 Moreover, any federal common law nuisance tort as may exist has never supported an action by
 5 non-State plaintiffs for damages. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 96-97, 108
 6 n.10 (1972); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907); *Missouri v. Illinois*,
 7 180 U.S. 208, 241, 244 (1901); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906). Finally, the
 8 Clean Air Act ("CAA") displaces the authority of courts to regulate nationwide greenhouse gas
 9 emissions and global warming through federal common law nuisance claims. The CAA "was
 10 intended comprehensively to regulate, through guidelines and controls, the complexities of
 11 restraining and curtailing modern day air pollution." *Bunker Hill Co. Lead & Zinc Smelter v.*
 12 *EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981). The CAA grants the EPA authority to regulate
 13 greenhouse gas emissions in accordance with that Act. *See Massachusetts v. EPA*, 127 S. Ct.
 14 1438, 1459-62 (2007). Congress has thus "spoke[n] directly" to the issue, *Milwaukee*, 451 U.S. at
 15 315, and thereby displaced the authority of courts to fashion their own rules and standards
 16 governing the same subject under the guise of federal common law. *See id.* at 320 ("Federal
 17 courts lack authority to impose more stringent [regulations] under federal common law than those
 18 imposed by the agency charged by Congress with administering this comprehensive scheme.").

19 3. Plaintiffs' conspiracy and concert of action claims are not independent torts, but
 20 simply means of assigning derivative liability for an underlying tortious act. *See Applied Equip.*
 21 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994); *Pac. Tel. & Tel. Co. v. MCI*
 22 *Telecomm. Corp.*, 649 F.2d 1315, 1319 (9th Cir. 1981); *Christensen v. NCH Corp.*, 956 P.2d 468,
 23 476 (Alaska 1998); *Chavers v. Gatke Corp.*, 107 Cal.App.4th 606, 615 (2003). These secondary
 24 liability claims thus fall along with the primary nuisance claims. Plaintiffs' conspiracy claims
 25 also seek to impose liability for activity that is protected by the Petition and Speech Clauses of the
 26 First Amendment to the U.S. Constitution, and must be dismissed for that reason as well. *See,*
 27 *e.g., City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-84 (1991); *Sosa v.*
 28 *DIRECTV*, 437 F.3d 923, 929-32 (9th Cir. 2006).

* * *

For the foregoing reasons, Defendants' Motion is GRANTED and Plaintiffs' Complaint is
DISMISSED WITH PREJUDICE.

SO ORDERED.

DATED: _____, 2008

By: _____

The Hon. Sandra Brown Armstrong
United States District Judge